

Sean Eskovitz (SBN 241877)
WILKINSON WALSH + ESKOVITZ LLP
11726 San Vicente Blvd., Suite 600
Los Angeles, CA 90049
Telephone: (424) 316-4000
Facsimile: (202) 847-4005
seskovitz@wilkinsonwalsh.com

Beth A. Wilkinson (*pro hac vice*)
Alexandra M. Walsh (*pro hac vice*)
Brian L. Stekloff (*pro hac vice*)
Rakesh N. Kilaru (*pro hac vice*)
WILKINSON WALSH + ESKOVITZ LLP
2001 M Street NW, 10th Floor
Washington, DC 20036
Telephone: (202) 847-4000
Facsimile: (202) 847-4005
bwilkinson@wilkinsonwalsh.com
awalsh@wilkinsonwalsh.com
bstekloff@wilkinsonwalsh.com
rkilaru@wilkinsonwalsh.com

Attorneys for Defendant
NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION

Patrick Hammon (SBN 255047)
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
525 University Avenue, Suite 1400
Palo Alto, CA 94301
Telephone: (650) 470-4500
Facsimile: (650) 470-4570
patrick.hammon@skadden.com

Jeffrey A. Mishkin (*pro hac vice*)
Karen Hoffman Lent (*pro hac vice*)
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
Four Times Square
New York, NY 10036
Telephone: (212) 735-3000
Facsimile: (212) 735-2000
jeffrey.mishkin@skadden.com
karen.lent@skadden.com

Attorneys for Defendants
NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION and WESTERN
ATHLETIC CONFERENCE

[Additional Counsel Listed on Signature
Page]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

IN RE NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION ATHLETIC
GRANT-IN-AID CAP ANTITRUST
LITIGATION

MDL Docket No. 4:14-md-02541-CW
Case No. 4:14-cv-02758-CW

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO CONTINUE TRIAL
DATE**

This Document Relates to:
ALL ACTIONS

Date: May 22, 2018
Time: 2:30 p.m.
Courtroom: Courtroom 2, 4th Floor
Before: Hon. Claudia Wilken

NOTICE OF MOTION TO CONTINUE TRIAL DATE

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on May 22, 2018, at 2:30 p.m., in Courtroom 2 of the above-captioned Court, located at 1301 Clay Street, Oakland, California, Defendants will, and hereby do, move the Court, pursuant to Northern District of California Civil Local Rule 40-1, to continue the trial date currently set for December 3, 2018.

MOTION TO CONTINUE THE TRIAL DATE

Defendants respectfully request that the Court continue the December 3, 2018 trial date set in the Court’s March 28, 2018 Order. A continuance is necessary to ensure that the NCAA can continue to be represented by the attorney, Beth A. Wilkinson, who has long been slated to try this case on the NCAA’s behalf. As mentioned at the January 16 hearing before the Court, Ms. Wilkinson is serving as lead counsel in a trial scheduled to begin on October 9, 2018. That trial has been on the docket for 14 months and could last up to 8 weeks—in other words, *past* the start date for the trial in this matter. In addition, Ms. Wilkinson is lead counsel in a criminal trial that will begin in January 2019. That trial, which was set shortly after the January 16 hearing in this case, is scheduled to last three months.

For these reasons, unless a continuance is granted, there is a serious risk that the NCAA will be deprived of its chosen counsel at the trial—and there is no question that the NCAA would lack Ms. Wilkinson’s counsel during pre-trial and post-trial proceedings that are critical to the resolution of this matter.

In further support of this Motion, Defendants state as follows:

1. At the January 16, 2018 hearing on the parties’ summary judgment and *Daubert* motions, the Court stated that it was “reluctant to try to set [a trial date]” for this matter based on the Court’s already busy trial schedule for 2018. Decl. of Rakesh Kilaru in Support of Defs’ Mot. To Continue Trial Date (“Kilaru Decl.”), Ex. 1, 1/16/2018 Hr’g Tr. at 81:10-16. The Court did mention that “maybe December” would work for its schedule. *Id.* at 82:20. In response, Ms. Wilkinson explained that she has “a trial that’s set in front of Judge Ramos in the Southern District of New York that starts in the middle of October” that “certainly . . . wouldn’t [settle]” and could be “a six- to eight-week trial.” *Id.* at 83:6-8, 12-13, 23-24. That case is captioned *City of New York and People of the State of New York v. FedEx Ground Package System, Inc.*, 13-cv-9173 (S.D.N.Y.) (the “*FedEx Trial*”). Following this exchange, the Court declined to set any trial date, though it did ask the parties to “think about December for at least some of it.” *Id.* at 84:4-5. The Court also suggested during

1 the hearing that it could “divide . . . up” the trial with “a week here, a witness here, another week,
2 another witness.” *Id.* at 81:21-22.

3 2. On March 28, 2018, the Court issued an Order setting “a bench trial of no longer than ten
4 days” starting on December 3, 2018. ECF No. 804 at 36. Under the Court’s standing pretrial order,
5 the parties will have to comply with several important deadlines during late October and November
6 2018, including for briefing on “all significant disputed issues of law” (October 16, 2018); trial briefs
7 and findings of fact and conclusions of law (October 30, 2018); and the final pretrial conference
8 (November 13, 2018).

9 3. Given her first-chair role in the *FedEx* trial,¹ which has been set for more than a year, Ms.
10 Wilkinson could very well be unavailable to defend the NCAA at trial unless the current December
11 3 date is continued. The State of New York has estimated that the *FedEx* trial could last “three to
12 four weeks,” or “maybe . . . longer,”² but as Ms. Wilkinson explained at the January 16 hearing, the
13 *FedEx* trial could actually last up to two months, *i.e.*, into December, given the complexity of the
14 issues in that case. Even if the *FedEx* trial were to conclude earlier, Ms. Wilkinson would have no
15 ability to meaningfully participate in any of the pretrial proceedings in this case.

16 4. Further, following the January 16 hearing, a January 2019 trial date was set in *United*
17 *States v. Babich, et al.*, 1:16-CR-10343-ADB (D. Mass.) (the “*Babich* Trial”)—a criminal case in
18 which Ms. Wilkinson represents Defendant John Kapoor, the founder and Chairman of the Board of
19 Insys Therapeutics, Inc. Dr. Kapoor retained Ms. Wilkinson as his lead counsel shortly after he was
20 indicted in October 2017.³ While trial was originally scheduled to begin on October 15, 2018, Dr.
21 Kapoor moved to continue the trial to April 2019 to ensure sufficient time to prepare his defense to
22 the government’s complicated allegations.⁴ The *Babich* Court denied that relief, instead ordering
23 that the trial be continued to January 28, 2019, with jury selection starting weeks before. Kilaru

24 ¹ See Kilaru Decl., Ex. 2, 11/17/2016 Beth A. Wilkinson Notice of Appearance, *City of New York*
25 *and People of the State of New York v. FedEx Ground Package System, Inc.*, 13-cv-9173
(S.D.N.Y.) (“*FedEx*”).

26 ² Kilaru Decl., Ex. 3, 5/25/2017 Hr’g Tr., *FedEx*, at 59:25-60:4.

27 ³ See Kilaru Decl., Ex. 4, 12/11/2017 Order Admitting Beth Wilkinson *Pro Hac Vice*, *United*
States v. Babich, et al., 1:16-CR-10343-ADB (D. Mass. Jan. 11, 2017) (ECF No. 253) (“*Babich*”).

28 ⁴ Kilaru Decl., Ex. 5, Def. Kapoor’s Unopposed Mot. for Continuance, *Babich* (ECF No. 265).

Decl., Ex. 6, 1/18/2018 Hr’g Tr., *Babich*, at 13:2-25. Based on the parties’ expectations concerning the length of this complex case, the *Babich* Court blocked 12 weeks on its calendar (from late January through mid-April) for trial. *See id.* at 13:14-25. In arguing the continuance motion to the *Babich* Court, Ms. Wilkinson strongly pressed for an April 2019 trial date, but she was unable to cite a scheduled trial date in this matter as a further argument in support of that position.

5. The *Babich* case is governed by the Speedy Trial Act, and Judge Burroughs not only denied a request to continue the trial to April, but made very clear that she will grant no further continuances of this criminal trial. *See id.* at 15:25-16:1.

6. Trying this case in December would seriously hamper Ms. Wilkinson’s representation of both the NCAA and Dr. Kapoor. With jury selection starting in the *Babich* Trial in January, Ms. Wilkinson would be unable to participate in the post-trial briefing and any other post-trial proceedings on behalf of the NCAA. Nor would she be in a position to participate as necessary in the preparation of Dr. Kapoor’s defense during the critical weeks leading up to his criminal trial.

7. That there are other attorneys involved in the defense of this complex matter does not change the fact that the NCAA chose *Ms. Wilkinson* to try the case on its behalf. Nor should the involvement of other attorneys undermine the NCAA’s settled expectation that it would have Ms. Wilkinson’s counsel in making critical strategic judgments during pre- and post-trial proceedings. *See Kaina v. County of Maui*, Cv. No 04-00608 DAE-LEK, 2007 WL 1153829, at *4 (D. Haw. Apr. 18, 2007) (granting continuance that “would serve the purpose of protecting Defendants’ right to be represented by the counsel of their choice,” and rejecting argument “that any number of other lawyers could be found to represent Defendants” as “of no consequence”); *see also Cole v. U.S. Dist. Ct.*, 366 F.3d 813, 817 (9th Cir. 2004) (“Parties normally have the right to counsel of their choice. . .”).

8. Defendants respect the Court’s orders and are mindful of its busy docket. But they respectfully submit that the most appropriate way to resolve this clear conflict—which implicates important interests of the NCAA and its member institutions as well as the constitutional rights of a criminal defendant—would be to continue the trial in this matter until June 2019. *See, e.g., Felder*

1 *v. Puthuff*, C-93-20303-RPA (EAI), 1995 WL 16821, at *3 (N.D. Cal. Jan. 13, 1995) (granting a
2 motion to continue trial date where counsel had an immovable trial conflict in another case).

3 9. This resolution would not unfairly prejudice Plaintiffs. At the January hearing, Plaintiffs'
4 counsel did not cite any urgent need for a trial in this matter, which has been pending for several
5 years, and instead suggested that the Court set a tentative trial date to help with scheduling possible
6 witnesses. *See* Kilaru Decl., Ex. 1, 1/16/2018 Hr'g Tr. at 82:12-16. Indeed, counsel conceded that
7 continuing any date that was set would not be prejudicial, noting: "If the [dates] have to be moved,
8 they get moved." *Id.* at 82:15-16.

9 10. This Court's recent Order on summary judgment suggests a final reason that a
10 continuance may be warranted. In its Order, the Court (1) concluded that a set of minor rules changes
11 since *O'Bannon* are sufficient to justify a second trial on whether there are procompetitive
12 justifications for the NCAA's rules, *see* 3/28/18 Order at 12-15, and (2) left open the possibility of
13 relying on materials created after the close of discovery, *see id.* at 35, notwithstanding Magistrate
14 Judge Cousins' denial of Plaintiffs' request to reopen discovery, *see* ECF 780-1 at 1-2 (Order
15 Denying Motion to Reopen Discovery), which this Court affirmed by operation of N.D. Cal. Local
16 Rule 72.2. The NCAA disagrees with both of those rulings in the summary judgment Order. But if
17 the Court believes that minor rules changes are relevant to the litigation of this case and that the
18 record in this case may reopen before trial, it is important to note that the NCAA will continue to
19 make rules changes, including as a result of the report and recommendations of the Commission on
20 College Basketball, which are anticipated to be issued on April 25, 2018. In October 2017, NCAA
21 President Mark Emmert, the NCAA Board of Governors, and the Division I Board formed this
22 independent Commission regarding college basketball to improve the integrity of processes and the
23 well-being of student athletes.⁵ Once the Commission issues its report, the NCAA Boards and
24 Leadership have committed to develop and enact rule changes necessary to implement the
25 Commission's recommendations, as early as August 2018 and at least before the commencement of
26 the 2018 basketball season in November 2018. If, over Defendants' objections, the Court permits

27 _____
28 ⁵ *See* Kilaru Decl., Ex. 7, NCAA, *Commission on College Basketball Charter*, NCAA.com (Oct.
11, 2017), <http://www.ncaa.org/governance/commission-college-basketball-charter>.

Plaintiffs to add evidence of these recommendations and rules changes to the record in any way (including by having their experts comment on them), a December 2018 trial date would deny Defendants a meaningful opportunity to develop a record as to how, if at all, this new evidence affects the claims and defenses in this case.

11. For the foregoing reasons, Defendants respectfully request that the Court continue the trial date in this matter to no earlier than June 2019, or in the alternative, schedule a status conference to discuss a new trial date.

Dated: April 6, 2018

WILKINSON WALSH + ESKOVITZ LLP

By: /s/ Beth A. Wilkinson

Beth A. Wilkinson (*pro hac vice*)
 Alexandra M. Walsh (*pro hac vice*)
 Brian L. Stekloff (*pro hac vice*)
 Rakesh N. Kilaru (*pro hac vice*)
 2001 M Street NW, 10th Floor
 Washington, DC 20036
 Telephone: (202) 847-4000
 Facsimile: (202) 847-4005
 bwilkinson@wilkinsonwalsh.com
 awalsh@wilkinsonwalsh.com
 bstekloff@wilkinsonwalsh.com
 rkilaru@wilkinsonwalsh.com

Sean Eskovitz (SBN 241877)
 11726 San Vicente Blvd., Suite 600
 Los Angeles, CA 90049
 Telephone: (424) 316-4000
 Facsimile: (202) 847-4005
 seskovitz@wilkinsonwalsh.com

Attorneys for Defendant
 NATIONAL COLLEGIATE ATHLETIC
 ASSOCIATION

Respectfully submitted.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Jeffrey A. Mishkin

Jeffrey A. Mishkin (*pro hac vice*)
 Karen Hoffman Lent (*pro hac vice*)
 Four Times Square
 New York, NY 10036
 Telephone: (212) 735-3000
 Facsimile: (212) 735-2000
 jeffrey.mishkin@skadden.com
 karen.lent@skadden.com

Patrick Hammon (SBN 255047)
 525 University Avenue, Suite 1100
 Palo Alto, CA 94301
 Telephone: (650) 470-4500
 Facsimile: (650) 470-4570
 patrick.hammon@skadden.com

Attorneys for Defendants
 NATIONAL COLLEGIATE ATHLETIC
 ASSOCIATION and WESTERN
 ATHLETIC CONFERENCE

PROSKAUER ROSE LLP

MAYER BROWN LLP

By: /s/ Scott P. Cooper

By: /s/ Britt M. Miller

Scott P. Cooper (SBN 96905)
Bart H. Williams (SBN 134009)
Kyle A. Casazza (SBN 254061)
Jennifer L. Jones (SBN 284624)
Shawn S. Ledingham, Jr. (SBN 275268)
Jacquelyn N. Crawley (SBN 287798)
2049 Century Park East, Suite 3200
Los Angeles, CA 90067
Telephone: (310) 557-2900
Facsimile: (310) 557-2193
scooper@proskauer.com
bwilliams@proskauer.com
kcasazza@proskauer.com
jljones@proskauer.com
sledingham@proskauer.com
jcrawley@proskauer.com

Attorneys for Defendant
PAC-12 CONFERENCE

Andrew S. Rosenman (SBN 253764)
Britt M. Miller (*pro hac vice*)
71 South Wacker Drive
Chicago, IL 60606
Telephone: (312) 782-0600
Facsimile: (312) 701-7711
arosenman@mayerbrown.com
bmiller@mayerbrown.com

Richard J. Favretto (*pro hac vice*)
1999 K Street, N.W.
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
rfavretto@mayerbrown.com

Attorneys for Defendant
THE BIG TEN CONFERENCE, INC.

POLSINELLI PC

ROBINSON BRADSHAW & HINSON

By: /s/ Leane K. Capps

By: /s/ Robert W. Fuller

Leane K. Capps (*pro hac vice*)
Caitlin J. Morgan (*pro hac vice*)
2950 N. Harwood Street
Suite 2100
Dallas, TX 75201
Telephone: (214) 397-0030
lcapps@polsinelli.com
cmorgan@polsinelli.com

Amy D. Fitts (*pro hac vice*)
Mit Winter (SBN 238515)
120 W. 12th Street
Kansas City, MO 64105
Telephone: (816) 218-1255
afitts@polsinelli.com
mwinter@polsinelli.com

Wesley D. Hurst (SBN 127564)
2049 Century Park East, Suite 2300
Los Angeles, CA 90067
Telephone: (310) 556-1801
whurst@polsinelli.com

Attorneys for Defendants
THE BIG 12 CONFERENCE, INC. and
CONFERENCE USA, INC.

Robert W. Fuller, III (*pro hac vice*)
Nathan C. Chase Jr. (SBN 247526)
Lawrence C. Moore, III (*pro hac vice*)
Pearlynn G. Houck (*pro hac vice*)
Amanda R. Pickens (*pro hac vice*)
101 N. Tryon St., Suite 1900
Charlotte, NC 28246
Telephone: (704) 377-2536
Facsimile: (704) 378-4000
rfuller@rbh.com
nchase@rbh.com
lmoore@rbh.com
phouck@rbh.com
apickens@rbh.com

Mark J. Seifert (SBN 217054)
Seifert Law Firm
425 Market Street, Suite 2200
San Francisco, CA 94105
Telephone: (415) 999-0901
Facsimile: (415) 901-1123
mseifert@seifertfirm.com

Attorneys for Defendant
SOUTHEASTERN CONFERENCE

SMITH MOORE LEATHERWOOD LLP COVINGTON & BURLING LLP

By: /s/ D. Erik Albright

By: /s/ Benjamin C. Block

D. Erik Albright (*pro hac vice*)
 Gregory G. Holland (*pro hac vice*)
 300 North Greene Street, Suite 1400
 Greensboro, NC 27401
 Telephone: (336) 378-5368
 Facsimile: (336) 433-7402
 erik.albright@smithmoorelaw.com
 greg.holland@smithmoorelaw.com

Benjamin C. Block (*pro hac vice*)
 One CityCenter
 850 Tenth Street, N.W.
 Washington, DC 20001-4956
 Telephone: (202) 662-5205
 Facsimile: (202) 778-5205
 bblock@cov.com

Jonathan P. Heyl (*pro hac vice*)
 101 N. Tryon Street, Suite 1300
 Charlotte, NC 28246
 Telephone: (704) 384-2625
 Facsimile: (704) 384-2909
 jon.hey@smithmoorelaw.com

Rebecca A. Jacobs (SBN 294430)
 One Front Street
 San Francisco, CA 94111-5356
 Telephone: (415) 591-6000
 Facsimile: (415) 591-6091
 rjacobs@cov.com

Charles LaGrange Coleman, III (SBN 65496)
 HOLLAND & KNIGHT LLP
 50 California Street, Suite 2800
 San Francisco, CA 94111-4624
 Telephone: (415) 743-6900
 Facsimile: (415) 743-6910
 ccoleman@hklaw.com

Attorneys for Defendant
 AMERICAN ATHLETIC CONFERENCE

Attorneys for Defendant
 THE ATLANTIC COAST CONFERENCE

WALTER HAVERFIELD LLP

BRYAN CAVE LLP

By: /s/ R. Todd Hunt

By: /s/ Meryl Macklin

R. Todd Hunt (*pro hac vice*)
 Benjamin G. Chojnacki (*pro hac vice*)
 The Tower at Erieview
 1301 E. 9th Street, Suite 3500
 Cleveland, OH 44114-1821
 Telephone: (216) 928-2935
 Facsimile: (216) 916-2372
 rthunt@walterhav.com
 bchojnacki@walterhav.com

Meryl Macklin (SBN 115053)
 560 Mission Street, 25th Floor
 San Francisco, CA 94105
 Telephone: (415) 268-1981
 Facsimile: (415) 430-4381
 meryl.macklin@bryancave.com

Attorneys for Defendant
 MID-AMERICAN CONFERENCE

Richard Young (*pro hac vice*)
 Brent Rychener (*pro hac vice*)
 90 South Cascade Avenue, Suite 1300
 Colorado Springs, CO 80903
 Telephone: (719) 473-3800
 Facsimile: (719) 633-1518
 richard.young@bryancave.com
 brent.rychener@bryancave.com

Attorneys for Defendant
 MOUNTAIN WEST CONFERENCE

JONES WALKER LLP

By: /s/ Mark A. Cunningham

Mark A. Cunningham (*pro hac vice*)
201 St. Charles Avenue
New Orleans, LA 70170-5100
Telephone: (504) 582-8536
Facsimile: (504) 589-8536
mcunningham@joneswalker.com

Attorneys for Defendant
SUN BELT CONFERENCE

FILER'S ATTESTATION

I, Beth A. Wilkinson, am the ECF user whose identification and password are being used to file the Motion for Supplemental Briefing. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories hereto concur in this filing.

/s/ Beth A. Wilkinson